

117984

DECISION



21358
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Robert

FILE: B-205969

DATE: April 2, 1982

MATTER OF: Professional Materials Handling Co., Inc.

DIGEST:

1. Where for purposes of determining whether a protest is timely the record is not clear on when the protester knew its basis for protest, the doubt will be resolved in the protester's favor.
2. Generally, a bidder who offers a bid acceptance period shorter than that requested in an IFB may not extend that period or revive the bid in order to qualify for award since such an extension would be prejudicial to other bidders who offered the requested acceptance period. However, where the contract was awarded to another firm within the shorter acceptance period, and the bidder that offered the shorter period protests the award, the bid may be accepted if the protest is sustained even though the acceptance period otherwise would have expired.

Professional Materials Handling Co., Inc., protests the rejection of its bid under Defense Logistics Agency (DLA) invitation for bids (IFB) No. 700-81-B-2138 for a forklift truck. Professional's bid was evaluated as the second low bid, and stipulated a bid acceptance period of 30 calendar days, instead of the 60-calendar day period requested by the IFB. Within the 30-day period, Professional filed a protest with DLA against the award to the low evaluated bidder. DLA sustained the protest, but Professional's 30-day acceptance period had expired by the time the agency was prepared to make award to that firm. DLA determined that it could not allow Professional to revive the bid, and the agency therefore rejected the bid.

We believe that DLA incorrectly rejected Professional's bid, and we sustain the protest.

Background

The IFB provided for a Labor Surplus Area (LSA) bid evaluation preference of 5-percent. Three bids were received at bid opening on August 26, 1981. Professional, which did not claim the preference, offered a truck for \$16,759. Ludlow Sales offered a truck for \$17,200, and represented that 80 percent of the contract costs would be incurred in an LSA. That representation made the firm eligible for the 5-percent preference, which in turn resulted in its bid being evaluated as lower than Professional's. The third bid was evaluated as considerably higher than Professional's and Ludlow's. The contract was awarded to Ludlow on September 18.

On September 22, Professional filed a protest with DLA against the award to Ludlow, alleging that Ludlow was offering a German-manufactured truck and therefore should not have qualified for the LSA bid evaluation preference. In response to Professional's protest, DLA determined that the truck Ludlow offered in fact was manufactured in the United States, but discovered that Ludlow's truck was not being manufactured in an LSA. Therefore, DLA concluded that Ludlow should not have been given the 5-percent evaluation preference, and that Professional should have been evaluated as the low bidder.

Initially, DLA determined that Ludlow's contract therefore should be canceled and award made to Professional. By the time DLA made that decision, however, Professional's 30-day bid acceptance period had expired. Based on decisions by this Office that a firm that offers less than the requested bid acceptance period (60 days in this case) cannot be allowed to extend or revive its bid, DLA determined that Professional could not receive the award, and that the requirement instead should be resolicited. Professional protested this action to our Office on December 30, 1981.

As a result of DLA's resolicitation, award to a firm other than Professional has been made. DLA has advised us, however, that it will suspend contract performance pending our decision in this matter.

Timeliness

As a preliminary matter, DLA submits that we should not consider Professional's protest because it was untimely filed

under our Bid Protest Procedures, which require that protests such as this one be filed no later than 10 working days after the protest basis is known or should have been known to the protester. 4 C.F.R. § 21.2(b)(2) (1981). In this regard, DLA contends that Professional knew of its basis for protest on December 3 as the result of a telephone conversation between an agency legal counsel and a representative of Professional. It is not clear from the record, however, that Professional was apprised during the December 3 telephone conversation of the specific reason why its bid was being rejected. The record's sole reference to this conversation is in the contracting officer's statement which indicates only that Professional was advised that the forklift truck requirement would be resolicited. It appears that Professional first was clearly informed of the reason why its bid was rejected--because in DLA's view the Government could not allow Professional to revive the bid after the 30-day acceptance period expired--in a DLA letter dated December 18, which Professional received on December 23.

Where a reasonable doubt exists as to the date that a firm first knows the basis for its protest, that doubt will be resolved in favor of the protester for purposes of our timeliness rules. See Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66. Using December 23 as the date when Professional first knew of its basis for protest, the protest filed on December 30 is timely and we will consider it on the merits.

Bid Acceptance Period

The following standard bid acceptance clause was included on the first page of the IFB:

"[T]he undersigned agrees, if the offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers * * *, to furnish any or all items * * * in the schedule."

Professional placed the figure "30" in the blank space, thus limiting its acceptance period to 30 days. The other two bidders under the IFB offered 60-day acceptance periods.

DLA decided that Professional could not be awarded the contract after the firm's 30-day acceptance period expired based on two decisions by our Office. We held in those decisions that (1) although the clause set out above does not establish a minimum acceptable bid acceptance period, it is in essence a request for a 60-day acceptance period, and (2) a bidder offering less than the requested acceptance period cannot be allowed to extend that period either before or after its expiration, where other bidders offered the longer acceptance period. Introl Corporation, B-206012, February 24, 1982, 82-1 CPD 164; Ramal Industries, Inc.--Reconsideration, B-202961.3, November 12, 1981, 81-2 CPD 400.

We do not agree with DLA, however, that the cited decisions preclude acceptance of Professional's bid. The rationale for holding that a bid offering an acceptance period which is shorter than the one requested can be neither extended nor revived is that the bidder has not assumed as great a risk of price or market fluctuations as have the firms that offered the requested acceptance period. Thus, allowing the bidder to decide whether it desires to extend the bid or whether to let it expire, subject to the dictates of its own particular interests, would be prejudicial to the bidders that offered the requested acceptance period and who therefore are bound by their bid prices for the entire period. Introl Corporation, supra.

We do not believe this rationale applies to a bidder which files a timely protest against award of the contract to another firm where the contract was awarded within the protester's bid acceptance period. The bidder in such a case is not attempting to extend its bid acceptance period after minimizing its exposure by initially offering a short acceptance period. Rather, by filing a protest against an award that was made within its offered acceptance time, the bidder is asserting that it was entitled to the award within that time and that it still seeks the award. Thus, unlike the bidder which offers a shorter period than its competitors, and then seeks to extend it when it would be advantageous for it to do so, the protester does no more than seek to correct a perceived impropriety that caused its bid to be rejected rather than accepted within the offered acceptance period. Under the circumstances, we believe the filing of a protest against the award that was made within the 30-day acceptance period offered here had the effect of tolling expiration of the period. See, e.g., Guardian Electric Manufacturing Company -- Request for Reconsideration, B-191871, May 9, 1979, 79-1 CPD 321. In such a situation, of course, the bidder is not automatically entitled to award; that entitlement depends on the outcome of the protest, over which the protester has little direct control.

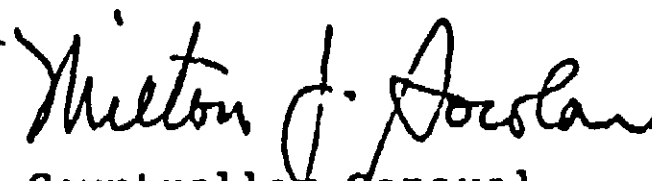
Consequently, we believe DLA could have accepted Professional's bid when it sustained Professional's original protest and terminated the contract previously awarded to Ludlow.

Remedy

By separate letter to the Director of DLA, we are recommending that the IFB be reinstated and award thereunder made to Professional. To implement this recommendation, DLA first must terminate the contract it awarded as the result of the resolicitation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

The protest is sustained.

for 
Comptroller General
of the United States



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-205969

April 2, 1982

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of Professional Materials Handling Co., Inc., wherein we recommend reinstatement of Defense Logistics Agency (DLA) invitation for bids (IFB) No. 700-81-D-2138 and award thereunder to the protester because we found that DLA improperly rejected Professional's low responsive, responsible bid. To implement this recommendation, DLA must terminate a contract awarded as the result of a subsequent resolicitation of the protested IFB's requirements.

The agency has been advised of its obligations under Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

for Shilton J. Jordan
Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-205969

April 2, 1982

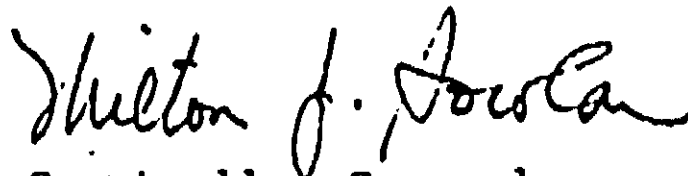
The Honorable Mark O. Hatfield
Chairman, Committee on Appropriations
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of Professional Materials Handling Co., Inc., wherein we recommend reinstatement of Defense Logistics Agency (DLA) invitation for bids (IFB) No. 700-81-B-2138 and award thereunder to the protester because we found that DLA improperly rejected Professional's low responsive, responsible bid. To implement this recommendation, DLA must terminate a contract awarded as the result of a subsequent resolicitation of the protested IFB's requirements.

The agency has been advised of its obligations under Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-205969

April 2, 1982

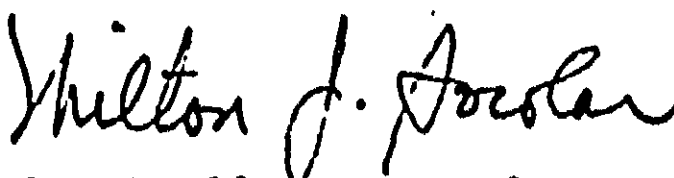
The Honorable Jamie L. Whitten
Chairman, Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of Professional Materials Handling Co., Inc., wherein we recommend reinstatement of Defense Logistics Agency (DLA) invitation for bids (IFB) No. 700-81-B-2138 and award thereunder to the protester because we found that DLA improperly rejected Professional's low responsive, responsible bid. To implement this recommendation, DLA must terminate a contract awarded as the result of a subsequent resolicitation of the protested IFB's requirements.

The agency has been advised of its obligations under Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-205969

April 2, 1982

The Honorable William V. Roth, Jr.
Chairman, Committee on Governmental
Affairs
United States Senate

Dear Mr. Chairman:

Enclosed is a copy of our decision of today on the protest of Professional Materials Handling Co., Inc., wherein we recommend reinstatement of Defense Logistics Agency (DLA) invitation for bids (IFB) No. 700-81-B-2138 and award thereunder to the protester because we found that DLA improperly rejected Professional's low responsive, responsible bid. To implement this recommendation, DLA must terminate a contract awarded as the result of a subsequent resolicitation of the protested IFB's requirements.

The agency has been advised of its obligations under Section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

Sincerely yours,

for *Shilton J. Jordan*
Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-205969

April 2, 1982

Vice Admiral E. A. Grinstead, Jr. (SC), USN
Director
Defense Logistics Agency
Cameron Station - DLAD
Alexandria, Virginia 22314

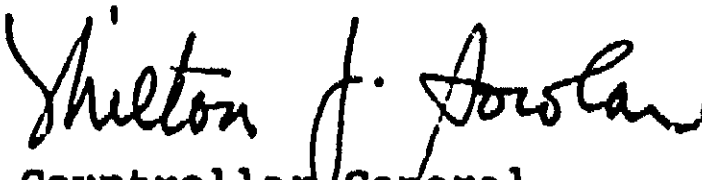
Dear Admiral Grinstead:

Enclosed is a copy of our decision of today on the protest of Professional Materials Handling Co., Inc. We have sustained the protest because Professional's bid was incorrectly rejected. In view of our decision, we recommend that invitation for bids (IFB) No. 700-81-B-2138 be reinstated and award thereunder be made to Professional. To implement the recommendation, the contract awarded as the result of a resolicitation of the protested IFB's requirements must be terminated.

As the decision contains a recommendation for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 236 of the Legislative Recorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires your agency to submit to the named committees within prescribed times written statements of the action taken on the recommendations.

We also would appreciate advice of the action taken on the recommendation.

Sincerely yours,

for 
Comptroller General
of the United States

Enclosure